Supreme Court, U.S.
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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,
PETITIONER,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an antitrust lawsuit by a physician alleging misuse of a hospital peer review process to exclude him from its integrated delivery system, the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, alters the burden of proof established in Rule 301 of the Federal Rules of Evidence, as interpreted by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

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OPINIONS BELOW

The district court issued two opinions in this case. The first opinion of the United States District Court for the District of Columbia (App. 28a-60a) is reported at 903 F. Supp. 140 (D.D.C. 1995). The second opinion of the United States District Court for the District of Columbia (App. 7a-27a) is reported at 1996 U.S. Dist. LEXIS 9532 (D.D.C. June 24, 1996). The order of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the grant of summary judgment in this case (App. 1a-2a) is unreported. The opinion of the district court denying the respondents' request for attorneys' fees (App. 82a-86a) is unreported. The prior opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 63a-81a) is reported at 951 F.2d 1268 (D.C. Cir. 1991).

JURISDICTION

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343, and 15 U.S.C. §§ 13, 26. The court of appeals entered its judgment on October 9, 1996. App. 2a. The court of appeals denied petitioner's timely petition for panel rehearing and a suggestion for rehearing *in banc* in unreported orders dated January 31, 1997. App. 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 411(a) of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a), provides

> (1) LIMITATION ON DAMAGES FOR PROFESSIONAL REVIEW AC-

> TIONS. If a professional review action . . . meets all the standards specified in section 412(a) . .
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> * * *
>
> (D) any person who participates with or assists a body with respect to the action,
>
> shall not be liable in damages under any law of the United States . . . with respect to the action . . . [t]he preceding sentence shall not apply to damages under any law of the United States . . . relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* and the Civil Rights Acts, 42 U.S.C. 1981, *et seq.*

Section 412(a) of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112(a), provides

> IN GENERAL. For purposes of the protection set forth in section

411(a), a professional review action must be taken

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 411(a) unless the presumption is rebutted by a preponderance of the evidence.

Rule 301 of the Federal Rules of Evidence provides

> In all civil actions and proceeding not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 56(c) of the Federal Rules of Civil Procedure provides

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This case concerns a physician who initiated a lawsuit in 1990 seeking declaratory and injunctive relief as well as money damages against a hospital on antitrust and civil rights grounds

for misusing its peer review process to terminate his medical staff admitting privileges. The physician claims that the hospital terminated his privileges and excluded him from its affiliated hospital-based managed care plans so as to funnel his then-500 yearly Medicaid admissions to its newly-developed Medicaid managed care plan. He alleges a continuum of anti-competitive and discriminatory activity including, termination and non-renewal of his privileges, removal from the hospital's "call" schedule for indigent patients, interference with his reappointment to the staff at another hospital, and interference with his membership in the hospital-based managed care affiliates. In 1991, the court of appeals reversed a district court finding that the physician's claims were not ripe for consideration and remanded the case for trial on the merits. *Johnson v. Greater Southeast Community Hosp.*, 951 F.2d 1268 (D.C. Cir. 1991). App. 63a-81a.

1. The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a) (HCQIA), casts a presumption of reasonable initial action by a defendant-hospital that may be overcome by a preponderance of the evidence from a plaintiff-physician. Under Rule 301, FED. R. EVID., a physician against whom such a presumption is directed must come forward with "evidence to rebut or meet the presumption." If the physician submits evidence to rebut the presumption, the hospital nevertheless retains the burden of proving the affirmative defense of reasonable action under Rule 301. Since the HCQIA does not relieve a hospital of its burden of proof on the requirements for immunity through the assertion of the evidentiary presumption, and there is no indication of such a Congressional intent in the legislative history of the statute, the physician does not assume the burden of proof on the question of immunity under Rule 301. Thus, at the summary judgment stage, the job of the district court in a proceeding in which immunity is asserted under the HCQIA first is to determine whether the physician's evidence is sufficient to overcome the

presumption of reasonable initial action. The district court then must determine whether the evidence raises any material issues of fact on the reasonableness of the hospital's investigative efforts, its hearing procedures, and its final action. On appeal, the job of the appellate courts is to review the physician's evidence *de novo*.

2. Petitioner Harold D. Johnson, M.D., is a board-certified obstetrician/gynecologist who established a solo medical practice in 1981. Overwhelmingly, Dr. Johnson provided services to poor, Medicaid beneficiaries, who resided east of the Anacostia River in Washington, D.C.[1] He is a good surgeon.[2] At the time of the events in question, Dr. Johnson had practiced obstetrics and gynecology for nearly 10 years without a single malpractice claim settled or adjudicated against him.[3] However, some physicians thought Dr. Johnson had a bad "attitude" when he responded to them by handwritten, rather than by typewritten, notes.[4]

Greater Southeast Community Hospital is a subsidiary of

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[1] *Affidavit of Harold D. Johnson, M.D., in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* ¶s 12-13, filed November 5, 1990; Ex 16 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[2] 1995 HCQIA Opp. Ex 88 at 2, *also filed as*, Ex 6 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* on November 5, 1990 ("Dr. McCants stated the physician's surgical technique was not in question").

[3] Ex 10 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment*, filed November 5, 1990.

[4] *Transcript of Medical Adjudication Hearing*, 1/15/90, at 156, filed September 27, 1990; 1995 HCQIA Opp. Ex 65.

the Greater Southeast Healthcare System.[5] On January 28, 1988, the Greater Southeast Community Hospital Foundation adopted a "strategic plan" that called for the development of 500 managed-care admissions to its hospital.[6] Throughout 1988, Dr. Johnson admitted 488 patients to Greater Southeast Community Hospital.[7] Also in 1988, an *ad hoc* committee of non-obstetrician/gynecologists conducted a retrospective chart review of Dr. Johnson's cases and concluded that no quality assurance issues had been found.[8]

On July 7, 1989, the hospital publicly announced its agreement to provide health care services to members of the Johns Hopkins Health Plan through its hospital-based physician group, United Health Services.[9] As part of that exclusive agreement, the hospital, the Johns Hopkins Health Plan, and

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[5] "The Greater Southeast Healthcare System (the "System") comprises The Greater Southeast Community Hospital Foundation, Inc. . . .and its not-for-profit and for-profit subsidiaries. The System is a vertically integrated health care delivery system providing health care services through a network of community hospitals, nursing homes and home health care and community based programs. The System primarily serves residents of the southeast quadrant of the District of Columbia . . .The System is served by more than 450 physicians." Ex L to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h). *See also* Ex 17 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[6] Ex B to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h) on June 12, 1995.

[7] Ex 16 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[8] *Transcript of Medical Adjudication Hearing*, 1/15/90, at 35, 49, filed September 27, 1990; 1995 HCQIA Opp. Ex's 61, 62, 65, 69, *also filed as*, Ex 2 to *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment* on September 28, 1990.

[9] Stephen K. Cooper, *Hopkins HMO Ties to Greater Southeast*, *WASHINGTON TIMES*, July 7, 1989, at C1.

United Health Services planned to provide managed care services to Medicaid beneficiaries.[10] On August 17, 1989, following a second retrospective chart review by an *ad hoc* committee of obstetrician-gynecologists within the department[11] the hospital suspended Dr. Johnson's privileges.[12]

After the hospital posted notice of the suspension in all of its departments,[13] and Dr. Johnson attended a hearing before the Medical Staff Executive Committee, on August 23, 1989, that committee restored his privileges subject to the requirement that he participate in a physician monitoring program.[14] On October 23 1989, the hospital Board of Directors rejected the recommendation of the Medical Staff Executive Committee and, instead, terminated Dr. Johnson's admitting privileges.[15] The Board took that action even though not a single hospital committee, entity, or physician ever recommended that the hospital terminate Dr. Johnson's privileges.[16] As a result of the

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[10] Ex 12 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990; Ex D to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h).

[11] *Transcript of Medical Adjudication Hearing*, 2/15/90, at 59.

[12] 1995 HCQIA Opp. Ex 78, *also filed as*, Ex 7 to *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment* on September 28, 1990.

[13] 1995 HCQIA Opp. Ex 79.

[14] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 26; 1995 HCQIA Opp. Ex 80; Compl. Ex E, *also filed as*, 1995 HCQIA Opp. Ex 81.

[15] 1995 HCQIA Opp. Ex 88 at 2, *also filed as*, Ex 6 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* on November 5, 1990.

[16] *Transcript of Medical Adjudication Hearing*, 2/16/90, at 253, filed September 27, 1990.

hospital's action, United Health Services and the Johns Hopkins Health Plan denied membership to Dr. Johnson the very next day;[17] he is not a participant in that integrated delivery system.[18]

In July 1990, Dr. Victor Nelson (defendant-appellee) caused Columbia Hospital for Women to suspend Dr. Johnson's privileges pending review of the index cases from the hospital.[19] Dr. Johnson then filed suit in August 1990 and the parties filed cross-motions for summary judgment on September 28, 1990. Dr. Johnson moved for partial summary judgment on his civil rights claims, arguing principally that the hospital had failed to explain why it terminated his privileges but reappointed three white physicians whom it knew to be incompetent through their long histories of malpractice claims and judgments.[20] The hospital claimed, *inter alia*, that it was entitled to immunity under the HCQIA.[21]

On October 31, 1990, Columbia Hospital for Women restored Dr. Johnson's privileges at that facility following its

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[17] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 13-14, filed September 27, 1990; Ex 4 to the Deposition of David E. Brown, then-president of the hospital and of United Health Services.

[18] An integrated delivery system is "a comprehensive continuum of health care services made available to a defined community within a geographic region through a financially integrated, centrally managed network of health care providers." DOUGLAS E. GOLDSTEIN, ALLIANCES: STRATEGIES FOR BUILDING INTEGRATED DELIVERY SYSTEMS 6 (1995).

[19] Compl. Ex M; Ex C to 1990-*Declaration of Victor J. Nelson*, M.D.; *Affidavit of Harold D. Johnson, M.D. in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment* at ¶ 5, filed November 5, 1990.

[20] *See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment* and its attached Ex's 3, 8, 10, 11, 12, 13, 14, 15, 16, filed September 28, 1990.

[21] The hospital also claimed that lawsuits such as this one are excluded entirely from the purview of federal civil rights laws.

review of the index cases from the hospital.[22] Thereafter, on November 5, 1990, Dr. Johnson filed a memorandum opposing the hospital's dispositive motion together with two (2) affidavits and 16 exhibits.[23] The district court dismissed the case as not ripe on December 12, 1990 since an internal hearing had not concluded and the court of appeals reversed in December 1991.

During the six (6) months between July 1992 and February 1993, Dr. Johnson sought unsuccessfully to compel discovery in this case.[24] Without explanation, the district court refused to compel discovery in December 1992 and left "to the parties the burden of resolving their disputes over the substance of any discovery requests or responses." App. 96a.[25] On February 1, 1993, Dr. Johnson again filed a motion to compel discovery. In May 1993, after the hospital filed several overlapping motions for summary judgment, Dr. Johnson moved for a stay of substantive briefing until the district court acted on his outstanding discovery motion.

The trial court held the last hearing in this case was on June 3, 1993.[26] In March 1994, Dr. Johnson filed a motion for

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[22] *Affidavit of Harold D. Johnson, M.D. in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment* at ¶ 5; Ex 11 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[23] Dr. Johnson filed a 17th exhibit with his supplemental memorandum in opposition on December 6, 1990.

[24] Dr. Johnson filed motions to compel discovery on July 14, 1992, on November 3, 1992, and on February 1, 1993.

[25] Also that day, the district court granted the hospital's motion to quash a third-party subpoena Dr. Johnson had issued to the bond issuer (Alex. Brown, Inc.) in a then-recent hospital transaction seeking access to financial data the hospital had refused to produce. App. 98a.

[26] The court below did not ever hold a hearing on the post-1990-motions for summary judgment.

a hearing on the discovery requests he had filed the previous year. Two years after Dr. Johnson filed his last motion to compel discovery, in January 1995, the court below denied that motion as well as his 1994-motion seeking to stay substantive briefing pe' 'ing the completion of discovery, noting that Dr. Johnson would

> [P]refer to await answers to pending interrogatories as well as resolution of [his] motion to compel document production. Among the matters on which plaintiff seeks discovery are financial data, details of contracts, and definitions of defendant hospital's relevant market. Each of these items is pertinent, states the plaintiff, to underlying substantive issues. Without adequate discovery, plaintiff contends he is unable to respond properly to the summary judgment motions.

App. 90a-91a.

In light of that district court's refusal to permit discovery, on June 1, 1995 Dr. Johnson opposed the hospital's motion for summary judgment asserting entitlement to immunity under the HCQIA and filed as exhibits thereto the documents then available to him. Dr. Johnson responded to the hospital's reply on June 19, 1995. With those two (2) memoranda, Dr. Johnson attempted to demonstrate the economic motivations for the hospital's actions. He filed 114 exhibits including: affidavits; deposition excerpts; answers to interrogatories; official public documents; transcripts of proceedings; and business records, albeit as redacted by the hospital. Dr. Johnson argued that the evidence would permit the trier of fact to reject the hospital's immunity defense notwithstanding the statutory presumption in

its favor.[27]

Dr. Johnson supported his opposition to the grant of immunity with expert testimony from Dr. Donald J. Sewell, Senior Attending Physician at the Washington Hospital Center, who testified unequivocally at the hospital hearing that Dr. Johnson had not deviated from the standard of care in any of the seven (7) cases at issue.[28] Dr. Johnson included affidavits from: 1) Robert A. Briskman, a private investigator (stating that his investigation revealed the undisclosed fact that the hearing officer and the instigating board member were colleagues at the George Washington University);[29] and 2) Sylvia B. Daniels, R.N., B.S.N., Director of Quality Management, University of Maryland Medical System (offering her expert opinion that the hospital's actions did not comport with contemporary quality assurance protocols for identifying and improving poor patient care).[30]

In his opposition, Dr. Johnson included deposition testimony from: 1) Dr. Raymond W. Turner (defendant-appellee), then the hospital's medical director;[31] 2) Andrea J. Sloan, then the hospital's risk manager;[32] 3) Dr. Edward Werner

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[27] The hospital did not challenge any of the evidence Dr. Johnson brought forward. Indeed, Dr. Johnson refiled in 1995 much of the same evidence he had filed in 1990 to oppose the 1990-motion for summary judgment and as he had filed in 1992, 1993, 1994, and 1995 in support of his motions seeking discovery.

[28] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 194-95, 204, 224, 234, 240, 247, filed September 27, 1990, *also filed as*, 1995 HCQIA Opp. Ex 3 on June 1, 1995.

[29] 1995 HCQIA Opp. Ex 91, *also filed as*, Ex 13 to Dr. Johnson's opposition to the hospital's motion for summary judgment on November 5, 1990.

[30] 1995 HCQIA Opp. Ex 4.

[31] 1995 HCQIA Opp. Ex 100.

[32] 1995 HCQIA Opp. Ex 8.

(discussing his own summary suspension and subsequent reappointment in 1989 following a maternal death at his hands and a hospital review disclosing 17 then-extant malpractice claims, and including documents that show the hospital submitted his cases to external reviewers who followed standard quality assurance review protocols prior to taking adverse action against him);[33] 4) Garylee Cox, Regional Vice President of the American Arbitration Association (stating that she selected the hearing officer because he had been acceptable to the hospital on the two (2) previous occasions when physicians challenged the termination of their privileges, not that he was chosen randomly as the hospital bylaws require);[34] and 5) Dr. William R. Coyle (defendant-appellee), one of three reviewers responsible for criticizing Dr. Johnson's cases (stating that he would participate in the "call" schedule for indigent Medicaid patients, as had Dr. Johnson prior to termination, if the hospital raised the payment to a hoped-for $5,000.00 per 24-hour period).[35]

Likewise, Dr. Johnson included the hospital's 1992-answers to his third set of interrogatories in which it refused to answer any questions concerning its strategic plans to increase its market share as a provider of women's health services[36] and

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[33] 1995 HCQIA Opp. Ex's 14, 14(a), 14(b), 14(c), 14(d), 14(e), 14(f), 14(g).

[34] 1995 HCQIA Opp. Ex 90. The district court incorrectly held (App. 22a) that the hearing officer had been assigned randomly in conformance with the hospital bylaws. However, even the hospital admitted that he had been chosen specially, not assigned randomly, and claimed that Dr. Johnson should have been satisfied with proceeding before "an experienced hearing officer in a manner comporting with the rules generally applicable in arbitration proceedings." *Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for summary Judgment on Grounds of HCQIA Immunity* at 16.

[35] Ex A to Dr. Johnson's 1995-statement of disputed facts filed pursuant to Local Rule 108(h).

[36] Ex O to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h).

excerpts of its 1993-bond offering document describing its position in the relevant market.[37] Also, Dr. Johnson included copies of the hospital's business records, such as the minutes from 14 board meetings,[38] minutes from 23 Medical Staff Executive Committee meetings,[39] minutes from four (4) Quality Assurance Committee meetings,[40] transcriptions of the August 1989-hearings before the Medical Staff Executive Committee.[41] Dr. Johnson included as well official hospital records contrasting how Dr. Edward Werner was subjected to review under the Credentialing Policy,[42] how his index case traveled through the quality assurance system from the surgical review committee[43] through the Medical Staff Executive Committee[44] to the hospital board[45] prior to the restrictions placed on his privileges in 1988,

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[37] Ex's L, M to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h). Dr. Johnson filed the complete bond offering document as Ex A to his May 10, 1993-motion to stay substantive briefing until the completion of discovery. As Ex C to that motion, Dr. Johnson also filed excerpts from the deposition of Dalton A. Tong, then-Chief Financial Officer of the hospital, together with an exhibit (Ex D) demonstrating the hospital's attempts to penetrate the Medicaid market.

[38] 1995 HCQIA Opp. Ex's 28, 35, 40, 41, 42, 43, 48, 51, 59, 85, 86, 87, 88.

[39] 1995 HCQIA Opp. Ex's 16, 18, 20, 21, 22, 23, 25, 35, 39, 44, 45, 49, 51, 56, 57, 58, 61, 62, 65, 67, 68, 77, 80.

[40] 1995 HCQIA Opp. Ex's 26, 29, 46, 108.

[41] Ex Q to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h).

[42] Compl. Ex D, *also filed as*, 1995 HCQIA Opp. Ex 4(c); 1995 HCQIA Opp. Ex 6.

[43] 1995 HCQIA Ex's 15, 17, 19, 22, 27, 38.

[44] 1995 HCQIA Ex's 16, 18, 20, 21, 23, 25.

[45] 1995 HCQIA Opp. Ex's 26, 27.

how the hospital used outside reviewers in his case,[46] and how the hospital monitored him before restoring his privileges.[47] Finally, Dr. Johnson filed earnings statements from the Johns Hopkins Health Plan and United Health Services for Drs. Coyle and Nelson, the competing physicians whose case reviews formed the basis for the hospital action.[48]

In October 1995, the district court again dismissed the action on ripeness grounds without addressing any of Dr. Johnson's evidence. App. 28a-60a.[49] In June 1996, the district court vacated its October 1995-order and dismissed Dr. Johnson's entire case. App. 7a-27a. The district court did not

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[46] 1995 HCQIA Opp. Ex's 14(a), 14(b), 37.

[47] 1995 HCQIA Opp. Ex's 34, 35, 48, 49, 52, 53, 55, 56, 57, 58, 59, 62.

[48] Ex F to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h), *also filed as*, Ex's F and G to *Plaintiff's Supplemental Memorandum in Support of Motion for Stay and for the Imposition of Sanctions* on June 3, 1993.

[49] On June 12, 1995, Dr. Johnson also had filed 24 exhibits with his supplemental memorandum in support of his 1990-motion for partial summary judgment and in opposition to the hospital's 1993-motion for summary judgment on civil rights claims that the district court refused to accept and failed to address in its October 1995-order. Dr. Johnson's submission of that day included: 1) the hospital's answers to his first set of interrogatories; 2) an affidavit from Alfred Edwards, Jr., M.D. (a physician previously terminated by the hospital through the actions of Dr. Coyle and Dr. Edward Hinman, defendants below); 3) additional excerpts from Dr. Coyle's deposition; 4) the hospital's 1990-statement of disputed facts filed in response to Dr. Johnson's 1990-motion for partial summary judgment; 5) excerpts of the deposition of Dr. Henry Gering (chairman of the department in 1988); 6) additional excerpts of the deposition of Dr. Edward Werner; 7) a second affidavit from Sylvia B. Daniels, R.N., B.S.N., Director of Quality Management, University of Maryland Medical System; 8) an affidavit from Russell L. Adams, Ph.D., offering expert testimony pertinent to the hospital's claim of exemption from Title VII; 9) additional excerpts of the deposition of David E. Brown, then-president of the hospital and of United Health Services; and 10) excerpts of the deposition of Dr. Nelson.

In spite of those submissions, and those of 1990, the district court also dismissed Dr. Johnson's civil rights claims by holding that neither 42 U.S.C. § 2000(e) (Title VII) nor 42 U.S.C. § 1981 applies to the factual situation here presented.

address, however, the sufficiency of Dr. Johnson's 114 exhibits and affidavits offered in 1995, or of those offered in 1990, to rebut the presumption of reasonable initial action when it held that he "failed to rebut this presumption by a preponderance of the evidence" and granted summary judgment to the hospital on the question of its immunity. App. 25a.[50] On appeal, the court of appeals did not address any of Dr. Johnson's evidence when it summarily affirmed the district court's decision.

REASONS FOR GRANTING THE PETITION

The decision in this case alters the proof requirements of Rule 301, FED. R. EVID., when hospitals raise the defense of immunity under the HCQIA in response to lawsuits by physicians alleging misuse of the peer review process. It permits a court to award summary judgment to a hospital without reviewing the evidence produced by a physician to rebut the statutory presumption of reasonable initial action and thereby expands the presumption without any indication that Congress intended so broad a reach. Therefore, the decision conflicts with this Court's interpretation of Rule 301 in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and with its interpretation of Rule 56, FED. R. CIV. P., in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Court should resolve this question because courts, such as the lower courts here, have expanded the evidentiary presumption of reasonable initial action beyond the parameters drawn in the statute. Thus, where Congress intended only a

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[50] The district court actually granted "defendants' motion for summary judgment on plaintiff's antitrust claims." App. 25a. In *dicta*, the district court held, alternatively, that Dr. Johnson had not opposed the hospital's motion on the substantive antitrust claim even though he previously had requested an enlargement of time within which to complete his response.

limited presumption,[51] many courts have created insurmountable obstacles for physicians seeking to protect their practices through judicial review. [52] Those obstacles, taken with decisions that have excluded self-employed female,[53] foreign-born, [54]and African-American physicians, such as Dr. Johnson,[55] from the protections afforded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), have effectively closed all avenues for judicial review of the actions by hospitals and their managed-care affiliates to eliminate targeted physicians as service providers at the close of the millennium.[56] Equally important to

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[51] *See Manion v. Lima Memorial Hosp.*, 986 F.2d 1036 (6th Cir. 1992) (holding that HCQIA shields peer reviewers from liability only, not from suit entirely), *cert. denied*, 114 S. Ct. 71 (1993); *Decker v. IHC Hosps. Inc.*, 982 F.2d 433 (9th Cir. 1992) *(same), cert. denied*, 113 S. Ct. 3041 (1993).

[52] *See, e.g., Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318 (11th Cir. 1994) (reversing jury determination that the physician was entitled to damages on his breach of contract claim based on HCQIA-immunity), *cert. denied*, 115 S. Ct. 1363 (1995).

[53] *State Comm'n on Human Relations v. Suburban Hosp., Inc.*, 686 A.2d 706 (Md. App. 1996) (holding that Title VII did not apply to female physician's claim of gender discrimination).

[54] *Alexander v. Rush N. Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996) (holding that Title VII did not apply to Egyptian-born Muslim's claims of discrimination).

[55] *Beverly v. Diggs*, 591 F. Supp. 1321 (S.D.N.Y. 1984).

[56] For example, Suburban Hospital of Bethesda, Maryland, has been successful in shielding its decisions to terminate, or not reappoint, physicians from judicial scrutiny under both Title VII and the HCQIA in separate actions. *See State Comm'n on Human Relations v. Suburban Hosp., Inc.*, 686 A.2d at 724; *Imperial v. Suburban Hosp. Assn., Inc.*, 37 F.3d 1026 (4th Cir. 1994) (finding hospital entitled to immunity under the HCQIA). Those physicians now are excluded from a recently-announced joint venture between Suburban Hospital and the Johns Hopkins University Hospital. *See* Stuart Auerbach, *Johns Hopkins, Suburban Hospital Forms Partnership; Alliance Gives Baltimore Facility a D.C. Presence, WASHINGTON POST*, July 25, 1996, at D14.

this Court's consideration is the public's right to know that the independent practitioners who served them in the past will not be excluded summarily from serving them in the future as hospital-based integrated delivery systems -- like the Greater Southeast Community Hospital/Johns Hopkins Health Plan/United Health Services venture here -- become the predominant model for medical care in this country.[57] Review by this Court of the question presented therefore is warranted.

1. The court of appeals' order to let stand the district court's decision is at odds with this Court's analysis of Rule 301 in *Saint Mary's Honor Center v. Hicks*, *supra*, in significant respects. Under Rule 301, as interpreted by this Court, a physician against whom the statutory presumption of reasonable initial action is cast should be directed to come forward with evidence to rebut that presumption. *A fortiori*, once the physician comes forward with the evidence, the trier of fact is required to evaluate it. *Cf. Smith v. Ricks*, 798 F. Supp. 605, 607, 611 (N.D. Cal. 1992) (noting review of 22 exhibits submitted by plaintiff-physician opposing the grant of immunity under the HCQIA), *aff'd*, 31 F.3d 1478 (9th Cir. 1994), *cert. denied*, 1996 U.S. LEXIS 2275. Nevertheless, the burden of proof, as in the risk of nonpersuasion, should remain at all times with the hospital asserting the presumption. *Saint Mary's Honor Ctr. v.*

In another instance, a court has held that the privileging decision of a hospital was excluded from coverage under Title VII and that the particular hospital also was entitled to immunity under the HCQIA. *See, e.g., Pamintuan v. Nanticoke Memorial Hosp.*, 1997 U.S. Dist. LEXIS 3300 (D. Del. February 24, 1997).

[57] In a 1994-survey, the accounting firm of Deloitte & Touche reported that 71 percent of the hospitals in the nation then were in the process of developing integrated delivery systems with 89 percent of inner-city hospitals expected to adopt that model by the end of the century. *See* Spencer Rich, *U. S. Hospitals Aren't Waiting for Congress, WASHINGTON POST*, June 21, 1994, at A4.

Hicks, 509 U.S. at 511.[58] Although Dr. Johnson met his burden of producing evidence for the trier of fact to consider, the district court did not evaluate that evidence before granting summary judgment to the hospital and thereby obliterated the proof requirements of Rule 301 applicable when there is an evidentiary presumption in operation. The district court's failure to evaluate the sufficiency of Dr. Johnson's evidence, and to determine whether the statutory presumption had been overcome by the specific evidence before it, therefore is in conflict with the Court's interpretation of Rule 301.

However, the conflict left standing by the court of appeals is an artificial one lacking Congressional support for the presumption actually afforded a defending hospital under the HCQIA is in harmony with the Court's interpretation of Rule 301. By enacting the presumption of § 412(a) of the HCQIA, Congress did not intend to change the burden of proof otherwise applicable in this civil action filed under federal antitrust and civil rights laws. Rather, the legislative history of the HCQIA indicates a Congressional intent to permit an antitrust action where the presumption of reasonable initial action is overcome by a preponderance of the evidence and not at all to affect a physician's right to declaratory or injunctive relief, or to pursue a civil rights claim.[59] It provides

> [T]he bill does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief. If the professional review action being

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[58] In *Gomez v. Toledo*, 446 U.S. 635 (1980), the Court held that the right to "qualified immunity" is an affirmative defense upon which a defending public official bears the burden of proof in an action brought under 42 U.S.C. § 1983. *But see Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 878 (3d Cir. 1995) (holding that physician bears burden of proving noncompliance with immunity provisions).

[59] *See* 42 U.S.C. § 11111(a).

> challenged fails to meet the standards of section 102(a), no immunity is provided and the suit can be tried without regard to the provisions of this bill.
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> * * *
>
> [T]he subsection provides a presumption to that a effect ["reasonable belief"] . . . This presumption applies only to the reasonable belief standard not to the others. . .
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> * * *
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> In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices.

H. Rep. No. 903, 99th Cong., 2d Sess. 9, 10, 11, *reprinted in*, 1986 U.S.C.C.A.N. 6392, 6393.

Congress intended to do no more than to grant hospitals the benefit of an unremarkable evidentiary presumption of reasonable initial action. That presumption may be overcome by a "preponderance of the evidence." 42 U.S.C. § 11112(a). Under that standard common in civil practice, the trier of fact must "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-72 (1970). Simply put, the trier of fact must weigh the evidence on both sides and determine which evidence more probably establishes the fact urged by its respective proponent. The failure to engage in that careful weighing of the evidence here makes Rule 301 a nullity in cases where the HCQIA is raised in defense to a lawsuit based on a hospital peer review action. That implicit modification of Rule

301 is a significant question of federal law this Court should resolve.

2. The decision below also conflicts with the law of this Court on the role of a court when presented with a motion for summary judgment. Summary judgment for the moving party is appropriate only when there has been adequate discovery and the non-moving "party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party's burden is one of producing evidence that is "significantly probative" of the issues raised in his complaint so as to preclude the grant of summary judgment to the moving party. *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

Before summarily granting immunity to the hospital, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. at 255. Here, the job of the district court, and of the appellate court on *de novo* review, was to determine whether Dr. Johnson's specific evidence raised any issues of material fact on the reasonableness of the hospital's initial action, on the reasonableness of its investigative efforts, on the reasonableness of its hearing procedures, or on the reasonableness of its final action, so as to preclude the summary grant of immunity under the HCQIA. *id.* at 254. Assuming the hospital met its burden of production under Rule 56, each court then was obligated to analyze the evidence put forward by the physician, as other courts have done, as a necessary predicate action to the award of summary judgment. *See, e.g., Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1333 (10th Cir. 1996) (noting that expert testimony on behalf of physician created triable issue of fact on reasonableness of hospital's action); *see also Bryan v. Holmes Medical Ctr.*, 33 F.3d at 1334 (noting that court "must examine the record in [the] case and determine whether [the physician]

satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of the act"), *cited in Matthews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 633 (3d Cir. 1996); *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992) (same).

Thus were the courts below required to apply the general Congressional admonishment against the use of competing physicians as reviewers[60] -- and the hospital's own admission that such actions are violative of antitrust laws[61] -- to Dr. Johnson's evidence of review solely by competing physicians who failed to use objective criteria to review his cases[62] and who gained financially from the integrated delivery system after his exclusion from its panel of providers to determine the reasonableness of the hospital's action. *See Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1065, 1066 (E.D. Cal. 1992) (finding hospital was entitled to immunity since it sought an outside evaluation of the index cases prior to taking adverse action), *aff'd*, 29 F.3d 1439 (9th Cir. 1994), *cert. denied*, 1995 U.S. LEXIS 757 (1995); *see also Matthews v. Lancaster Gen. Hosp.*, 87 F.3d at 633 (same). So, too, should the lower courts have determined whether Dr. Johnson's evidence that the Board refused to institute a monitoring program as the Medical Staff Executive Committee recommended,when not a single physician or committee ever recommended termination, was a reasonable

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[60] Congress generally intended that a hospital hearing panel be composed of reviewers from different specialities or from different geographic locations. *See* H. Rep. No. 903, 99th Cong., 2d Sess. 11, *reprinted in*, 1986 U.S.C.C.A.N. 6393. The contrary view of the district court (17a) is wrong.

[61] 1995 HCQIA Opp. Ex 101, stating that "[a]ntitrust law demands that hospitals not use local competitors to evaluate a physician's . . . clinical performance."

[62] 1995 HCQIA Opp. Opp. Ex's 2 at 37, 40, 63, 70; 9 at ¶ 3; 10 at ¶ 6. *See also* Declaration of (defendant) Victor Nelson at ¶ 7.

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hearing procedures. And so, too, should the lower courts have evaluated each of the 114 specific exhibits Dr. Johnson brought forward in 1995, along with all other evidence he submitted between 1990 and 1995, before awarding summary judgment to the hospital based on an evidentiary presumption applicable to a single prong of a statutory four-part test.

Because the district court decision left standing by the court of appeals fails to detail why the evidence put forward was insufficient to survive the motion for summary judgement, it expands the umbrella of immunity beyond the limited parameters contemplated by Congress: It creates the right to absolute immunity for a hospital under the HCQIA. Congress did not intend to grant hospitals the right to exclude physicians from their integrated delivery systems with complete impunity. The Court should resolve this important issue of federal law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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excluded the guidelines of the American College of Obstetricians and Gynecologists on quality assurance and peer review (Ex's 4, 5, to Dr. Johnson's 1990-motion for partial summary judgment, *also filed as*, 1995 HCQIA Opp. Ex's 4(d), 4(e)) and the hospital's Credentialing Policy (Compl. Ex D, *also filed as*, 1995 HCQIA Opp. Ex's 4(c), 6). *See Transcript of Medical Adjudication Hearing*, 2/15/90, at 66-69, 123-26, 146-47; 2/16/90 at 258-60.